# Petition

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NO. 81-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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ALBERT GREEN,
ALFRED KINCAID, and
KELLY TWOMEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the boarding of a foreign flag vessel upon the high seas to search for evidence of criminal activities in violation of the express prohibitions of the Convention on the High Seas violated the law of the United States?

2. Whether the boarding of a foreign flag vessel was permissible in this case under the authority of 19 U.S.C. §§1581(h), 1587(a) in the absence of any proof of a "special arrangement", and even assuming such proof, are those provisions applicable to this search for evidence of criminal activity on a foreign sailing vessel in international waters?

3. Whether, under the fourth amendment, law enforcement authorities may constitutionally search the private

living area of a foreign sailing yacht for evidence of criminal activity without probable cause?

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## REFERENCE TO OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is United States v. Green, et al., reported at 671 F.2d 46 (1st Cir. 1982), Appendix A (A.1-30). The order denying rehearing is not reported, and is attached hereto at Appendix B (A. 31-32). The two decisions of the United States District Court of Massachusetts, Hon. Walter Jay Skinner, denying, then upon reconsideration granting the petitioners Motion to Suppress Evidence were not reported, but are attached hereto at Appendix D and E (A. 35, 77).

## JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on February 19, 1982 reversing the United States District Court of Massachusetts grant of petitioners'

motion to suppress evidence (A. 1-30). Petitioners' petition for a rehearing was timely filed and was denied on March 12, 1982 (A. 31-32).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The relevant provisions are: United States Constitution, article VI, clause 2 and amendment IV; 14 U.S.C. §89(a); 19 U.S.C. §§1581(h), 1587(a); Convention on the High Seas, September 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, articles 6, 22. Each provision is set out in full in Appendix F (A.82).

## STATEMENT OF CASE

On August 11, 1980, [1] the Coast Guard vessel RELIANCE, observed the

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[1] The Court of Appeals reference to April 11, 1980 was in error and was subsequently corrected by court order on April 20, 1982, attached hereto as Appendix C (A. 33).

PERSISTENCE, a 52-fcot sailing sloop properly flying a British flag, on the high seas, 55 miles east of Provincetown, Massachusetts. Several factors made the captain of the RELIANCE suspicious of the PERSISTENCE including his opinion that the vessel was moving sluggishly and appeared lower in the bow than normal, and that she was listed under category 3 by the Drug Enforcement Agency's El Paso Intelligence Center, meaning to him that she was suspected of illegal activities and should be boarded if possible (A. 2-5).

The RELIANCE sought and was denied permission to board the PERSISTENCE by its crew. The RELIANCE then sought and was told they received no objection from the United Kingdom to board and search the PERSISTENCE (A. 5-6).

On August 11, the RELIANCE informed

the PERSISTENCE that Britain had consented to a boarding of the vessel, which was thereafter completed. After reviewing the vessel's documentation, a prior boarding report, and the identification of those on board, the petitioner Kincaid reluctantly complied with the Coast Guard boarding parties' orders to open the closed hatch to the living area (A. 7). At the time the hatch was opened, both courts below found that reasonable and articulable grounds existed for suspecting that the PERSISTENCE was engaged in criminal activity (A. 29, 61, 79).

When the hatch was opened, plastic and burlap wrapped bales and the smell of marijuana became apparent (A. 7). The petitioners were then arrested, the vessel seized and towed to Boston (A. 2-3). The petitioners were charged with conspiracy to import marijuana, in

violation of 21 U.S.C. §§952(a), 963, and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §§841(a)(1), 846. (A. 3).

A Motion to Suppress Evidence was timely filed by the petitioners, as well as other pretrial motions, and after evidentiary hearings, the motion to suppress was first denied in a Memorandum Opinion on February 19, 1981 (A. 35), but subsequently granted on April 16, 1981 upon reconsideration (A. 77). After reviewing photographs of the vessel and taking testimony, the district court concluded that the search of the PERSISTENCE was for evidence of criminal activities, in the living quarters of the yacht, was not based upon probable cause, and was therefore unconstitutional (A. 79-81).

While before the District Court, the petitioners also proferred that

after an investigation, petitioners were led to believe that Great Britain did not, in fact, consent to the search of the PERSISTENCE. Therefore, petitioners sought the issuance of letters rogatory to prove that Great Britain did not, and could not under its own domestic laws, consent to the search. [2] A cable from the American Embassy in London to the Department of State alleging British consent was admitted into evidence, over the petitioners objections, only to prove that the communication was sent and received, and

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[2] It has always been the petitioners' contention, in both lower federal courts, that the Coast Guard and the State Department are well aware of the fact that Great Britain cannot, under its own domestic laws, authorize law enforcement actions such as those involved in this case, citing "Coast Guard Drug Law Enforcement," Hearings before the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries on H.R. 2538, 96th Cong., 1st Sess. 34, 57 (March 28, 1979).

not for the truth of its contents (A. 38). Since the issue of British consent was not a factual matter upon which the district court relied in making its conclusions of law, the request for letters rogatory was denied (A. 75-76).

The government filed a Notice of Appeal pursuant to 18 U.S.C. §3731, on April 22, 1981. After argument, the Court of Appeals for the First Circuit issued an opinion reversing the District Court's grant of the Motion to Suppress (A. 1-30). On March 5, 1982 the petitioners filed a Petition for Rehearing. This petition was denied on March 12, 1982 (A. 31-32).

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT SHOULD RESOLVE WHETHER THE BOARDING OF A FOREIGN FLAG VESSEL UPON THE HIGH SEAS TO SEARCH FOR EVIDENCE OF CRIMINAL ACTIVITIES IN VIOLATION OF THE EXPRESS PROHIBITIONS OF THE CONVENTION ON THE HIGH SEAS VIOLATED THE LAW OF THE UNITED STATES.

The Convention on the High Seas codifies the venerated principle of international law known as the right of free passage upon the high seas. Article 6 provides that a vessel on the high seas is under the exclusive jurisdiction of the nation under whose flag she sails except in certain cases expressly provided for in international treaties (A. 87-88).

Article 22 sets out the principle of non-interference whereby a "warship", such as a Coast Guard cutter, see United States v. Cadena, 585 F.2d 1252, 1260 n. 16 (5th Cir. 1978), is prohibited from boarding a

foreign vessel on the high sea except under a treaty or when one of three enumerated circumstances exist. These exceptions require that there be "reasonable suspicion to believe: (a) that the vessel is engaged in slavery, or (b) that the vessel is engaged in piracy,or (c) that the vessel is actually of the same nationality as the war ship in question." Convention on the High Seas, Article 22 (A. 87-88).

In this case, the First Circuit recognized that a violation of a self-executing treaty would "prevent our courts from exercising jurisdiction over the vessel and would provide a basis for suppression of evidence discovered during an unlawful seizure." 671 F.2d at 50 (A. 11), citing Cook v. United States, 288 U.S. 102 (1933) (where this Court held a self-executing treaty governing the boarding of

British vessels limited the authority of the United States so that a vessel's seizure not expressly authorized by the treaty was invalid).

This Court has previously explained that a treaty which reads like a statute and creates rules by which the rights of private citizens may be determined and enforced should be interpreted as self-executing. See e.g., Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 589-90 (1884). Both articles 6 and 22 meet the Court's criteria and should have been construed as self-executing, and therefore part of our domestic law. United States Constitution, Article VI, clause 2. If properly interpreted as self-executing, then the violation of the treaty by this search requires suppression of the evidence under this Court's holding in

Cook, supra.

The circuit courts that have interpreted the Convention on the High Seas in the context of searches for evidence of criminal activities have been less than consistent in their conclusions. For instance, in United States v. Cadena, supra at 1260 n.16, a panel of the Fifth Circuit reasoned that although Articles 6 and 22 were apparently self-executing, the Cook decision did not apply since the flag nation of that foreign vessel was not a signatory to the Convention on the High Seas. Subsequently, in United States v. Postal, 589 F.2d 862 (5th Cir.) cert. denied, 444 U.S. 832 (1979), another panel of the Fifth Circuit recognized that both the United States and Great Britain are signatories to the Convention on the High Seas but, in the only decision to directly address

the issue, found that Article 6 was not self-executing. The Postal court acknowledged that the issue of self-execution is a "confounding" one, 589 F.2d at 876. The analysis and conclusion in Postal that Article 6 is not self-execuing has been soundly criticized. See Riesenfeld, "The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?" 74 Am. J. Int'l L. 892 (1980); Note, "'Smoke on the Water:' Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone," 13 N.Y.U.J. Int'l L. & Pol. 249, 302-16 (1980); Comment, "Treaties - Article 6 of the Convention on the High Seas is Not Self-Executing" 55 Notre Dame Law. 292 (1979); Comment, "United States v. Postal, Lost on the High Seas," 31 Mercer L. Rev. 1081 (1980).

Even in the opinion below, the cir-

cuit court stated that whether Article 6 is self-executing is a difficult issue and acknowledged the substantial criticism of the Postal decision. The court then evaded the issue, holding that Article 6 was not violated because Great Britain consented to the boarding.[3]

The First Circuit's rationale was erroneous. First, no provision of the Convention on the High Seas, or any other treaty between the United States and Great Britian, provides for such consent as an exception to Article 6. See Cook v. United States, supra (where this Court declined to recognize implied exceptions to the express limi-

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[3] The district court properly found that the Convention was violated, but relied on the questionable decision in United States v. Postal, supra, to hold that the treaty was not self-executing and therefore not applicable. As noted, the First Circuit did not adopt the Postal doctrine.

tations of a similar treaty).[4] Furthermore, United States officials recognize that Great Britian has no authority to give such consent under its own domestic laws. See discussion supra at 6, n.2. Accordingly, it is unreasonable to find consent here as an exception to Article 6. Second, assuming arguendo that British consent

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[4] A new Law of the Sea Convention has now been approved by the United Nations and is open for signatures. Its provisions do enlarge the powers conferred by present Article 22 to include the boarding of foreign vessels in coordination with the flag nation when such vessels are reasonably suspected of illicit traffic in drugs. See Third United Nations Conference on Law of the Sea, Revised Single Negotiations Text, Article 96. Such an authorizing provision is not now in effect as to the United States, and will not be until such time as the United States sees fit to become a member of this Convention. So far, the United States has not become a signatory. In any event, this Convention was not operative at the time of this search.

had been established here, [5] a foreign nation can not waive the rights of our citizens. Reid v. Covert, 354 U.S. 1, 16 (1957); United States v. Striefel, 665 F.2d 414, 420 n.8 (2d Cir. 1981); United States v. Conroy, 589 F.2d 1258, 1265 (5th Cir.), cert. denied, 444 U.S. 831 (1979). The court below erroneously found to the contrary.

Independent of the applicability of Article 6, the question as to whether Article 22 is self-executing remains undecided. No court, including the court below, has ever decided this

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[5] A cable from the American Embassy in London to the United States Department of State regarding the alleged British consent was not introduced for the truth of its contents. There was no other evidence regarding the consent. Since the government bore the burden of establishing British authority or consent and offered no evidence, their burden was not met. Had the cable been offered for its truth, the petitioners would have shown it to be false through testimony sought via letters rogatory. See discussion supra at 5-7.

issue, including the court below.[6] Under the guidance provided by this Court regarding the interpretations of treaties, Article 22 should be construed as self-executing. This article is written like a statute, it needs no implementing legislation, it provides private citizens with the right to redress violations of its provisions without the assistance of any government, and no government can waive these private enforceable rights. The Article's express rights and limitations are inconsistent with a finding that it is non-self-executing. Britianna was in no position to waive

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[6] A treaty need not be wholly self-executing. A particular provision may be self-executing while another may require implementing legislation. See Aguilar v. Standard Oil Co., 318 U.S. 724, 728 (1943).

the rules.[7]

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[7] In Reid v. Covert, supra, 354 U.S. at 6, the Court held that the power and authority of the United States is entirely dependent on the Constitution and at all times limited accordingly. Since no law of the land authorizes consent boardings, such a practice appears unconstitutional. The Second Circuit has expressed reservations about whether such consent boardings are constitutional. See United States v. Streifel, supra, 665 F.2d at 420 n. 8.

It is also significant that Congress has declined to authorize such boardings. When the legislation popularly titled the "Marijuana on the High Seas Act" was first drafted it included a provision empowering the Coast Guard to board foreign vessels "subject to the jurisdiction of the United States" upon obtaining consent of the flag nation. See "Coast Guard Drug Enforcement Hearings," supra, at 8. Department of Justice officials testifying on the bill raised some questions about the legality of such a provision. Whether that testimony was the reason is unclear, but that provision was deleted from the legislation as finally enacted. See 21 U.S.C. §955b, Pub. L. 96-350, §2, Sept. 15, 1980, 94 Stat. 1160. A power that Congress has declined to authorize legislatively should not be granted by judicial fiat. Until the power to board foreign vessels by flag nation consent is expressly authorized by law, federal courts should refuse to sanction the exercise of such power.

The First Circuit, though not reaching the issue of self-execution, held that Article 22 did not function as a separate prohibition of interference, 671 F.2d at 49-50, n.3 (A. 10), and therefore did not offer the petitioners any relief. The court's decision in this respect runs contrary to the Fifth Circuit's conclusion in United States v. Cadena, supra at 1260, n. 17, that Article 22 is a separate prohibition, apart from Article 6. See also, United States v. Postal, supra at 884 n. 35.

The opinion below provokes great uncertainty as to the proper interpretation of the Convention because the plain language of both Article 6 and 22 is in stark conflict with the circuit court's decision. Inasmuch as this issue affects our relations with other

nations, this Court ought to resolve these conflicts.

The issues involving the treaty are substantial and complex. The opinion below conflicts with prior decisions of this Court and in the absence of some direction from the Court, confusion about the reach and proper interpretation of the Convention on the High Seas is likely to continue.

## II.

## THE COURT SHOULD RESOLVE THE CONFLICT IN THE COURTS OF APPEALS OF WHETHER 19 U.S.C. §§1581(h) AND 1587(a) AUTHORIZE THE COAST GUARD TO SEARCH FOREIGN VESSELS ON THE HIGH SEAS, AND IF SO, WHETHER THESE PROVISIONS ARE APPLICABLE TO VALIDATE THE SEARCH IN THIS CASE.

The opinion below held that the boarding and search of the PERSISTENCE by the Coast Guard was authorized under the customs statutes, 19 U.S.C. §§1581(h) and 1587(a). The court interpreted these statutes as permitting the Coast Guard to board a foreign flag vessel to enforce the laws of the United States pursuant to a "special arrangement" with the vessel's foreign flag nation. The court of appeals found such a "special arrangement" authorized the boarding and search of the PERSISTENCE (A. 18).

This decision is in direct conflict with the Fifth Circuit's en banc deci-

sion in United States v. Williams, 617 F.2d 1063, 1073 (5th Cir. 1980), where the court held, after considering 19 U.S.C. §§1581 and 1587, that the Coast Guard's only source of statutory authority to seize and search vessels beyond the twelve-mile limit is 14 U.S.C. §89(a).[8] Contra: United States v. Dominguez, 604 F.2d 304,308 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). This obvious conflict in the source of Coast Guard statutory authority to board and search foreign vessels on the high seas needs

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[8] The reliance in the opinion below on 19 U.S.C. §§1581(h) and 1587(a) as statutory authority for the boarding and search of the PERSISTENCE rather than 14 U.S.C. §89(a) highlights the uncertainty regarding Coast Guard authority over foreign vessels. The legislative history of 14 U.S.C. §89(a) indicates the statute was enacted to ratify the power of the Coast Guard to search only American vessels beyond the twelve-mile limit. See H.R. Rep. No. 2452, 74th Cong., 2d Sess. 2 (1936); United States v. Warren, 578 F.2d 1058, 1069 (5th Cir. 1978)(en banc).

resolution.[9] Moreover, the decision below presents other significant issues regarding "special arrangement" boardings and the Coast Guard's law enforcement authority over foreign vessels on the high seas which should be examined.

First, there is no evidence in the record that Great Britain had entered into a "special arrangment" with the United States regarding the search of the PERSISTENCE. The government did not prove British consent. The cable relied upon by the court of appeals was admitted only to prove that the communication was sent and not for the truth of the matters asserted therein

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[9] This conflict is substantial because the reasonable suspicion standard of 14 U.S.C. §89(a) adopted in United States v. Williams, supra, for high seas searches does not apply to searches pursuant to customs authority, where probable cause is specifically required for searches on the high seas. See 19 C.F.R. §162.3(2).

(A. 38). See discussion supra at 5, 15. Additionally, the government should not be heard to claim this action was authorized under a "special arrangement" with Great Britain after high officials from both the Coast Guard and State Department have testified before Congress that Great Britain cannot grant such authority. See discussion supra at 6 n.2.

Furthermore, it is entirely unclear what constitutes a valid "special arrangement." The statutes provide no definition and it is not a term of common usage. The absence of any standards to govern such arrangements leaves federal, executive officials with "unbridled discretion" in determining when a "special arrangement" to search foreign vessels exists. This Court, however, has "refused to impute to Congress the grant of 'unbridled

discretion'" to a federal agency. Kent v. Dulles, 357 U.S. 116, 128 (1958). Without a ruling by this Court, the provisions of 19 U.S.C. §§1581(h) and 1587(a) will continue to be used by executive officers to undermine constitutional guarantees by the expedient of an undefined "special arrangement."

Even assuming arguendo that a "special arrangement" was shown to exist in this case, the court of appeals' reliance on the customs provisions as authority for the search of the PERSISTENCE is inconsistent with the purpose of these provisions and the intent of Congress. The legislative history of the customs statutes indicates the statutes were enacted only to ensure that customs boarding authority was consistent with the limits of international law. See H.R. Rep. No. 868, 74th Cong., 1st Sess. 2,4(1935).

Since those limits are now defined in the Convention on the High Seas, which does not recognize "special arrangment" boardings, these statutory provisions have been superceded by the treaty. See United States v. Cadena, supra, 585 F.2d at 1260.

Even if the "special arrangement" provisions remain in effect, various federal statutes and regulations preclude application of the customs statutes to this case. The Court should consider more recent limitations of drug enforcement authority which prohibit the search of the PERSISTENCE pursuant to customs provisions. The recent case of United States v. Harrington, 520 F.Supp. 93 (E.D. Ca. 1981) held that Reorganization Plan No. 2 of 1973, 87 Stat 1091, 1973 U.S. Code Cong. & Ad. News 3554 strips the Customs Service of all enforcement

functions vis-a-vis the drug laws with the express exception of border searches. The opinion below conflicts with the Harrington decision since the search of the PERSISTENCE was upheld on the basis of customs authority, but was not a border search.

In a related context, the Court should examine drug enforcement authority over foreign vessels on the high seas in light of 22 U.S.C. §2291(c)(1) which provides in pertinent part:

> Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in a foreign country with respect to narcotic control efforts.

A crime aboard a foreign vessel while on the high seas is the same as a crime in the foreign country. See United

States v. Flores, 289 U.S. 137 (1933)[10] Thus, the search of the PERSISTENCE for drug violations was prohibited by 22 U.S.C. 2291(c)(1) in spite of the court of appeals holding to the contrary.

Finally, when acting under customs authority, Coast Guard officers are subject to all the rules and regulations governing officers of the customs with respect to law enforcement. See 14 U.S.C. §§89(b), 143. Under the regulations of the Customs Service, a

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[10] Similarly, under 22 C.F.R. §83.7 crimes aboard vessels upon the high seas are cognizable only in the country to which the vessel belongs and for such purposes the vessel is treated as part of that country. Thus, crimes aboard foreign vessels while upon the high seas are beyond the jurisdiction of the United States. See also 21 U.S.C. §955 b, (where Congress declined in the most recent enactment of Coast Guard drug enforcement authority to extend the jurisdiction over foreign vessels for drug violations by virtue of flag nation consent.)

customs officer may not board and search an American vessel upon the high seas absent probable cause to believe the vessel is violating the laws of the United States. 19 C.F.R. §162.3(2). These regulations are silent as to what standard of cause is necessary to search foreign vessels on the high seas, but permits such searches based upon treaties or special arrangements with foreign governments. See 19 C.F.R. §162.3 (3). Since Coast Guard searches on the high seas of American vessels under customs authority require probable cause, at a minimum, probable cause should be required for high seas "special arrangement" searches of foreign vessels. Otherwise, "unbridled discretion" would be in the hands of some unknown British or other foreign official to authorize searches by our government offcials without concern for

the fundamental constitutional guarantees on which this country was founded. Such an outcome is untenable. See Reid v. Covert, supra, 354 U.S. at 16.[11] See also Boyd v. United States, 116 U.S. 746 (1886)(where this Court recalled the immortal words of James Otis describing the English customs writ of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book" since they placed "the liberty of every man in the hands of every petty officer").

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[11] Such ad hoc determinations of authority to search foreign vessels by government officials would also conflict with the decisions of this Court that the fourth amendment does not contemplate the executive officers of our government as magistrates capable of authorizing searches and seizures. See United States v. United States District Court, 407 U.S. 297, 317 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971).

The Court should provide clarification as to the interplay of the various federal statutes and regulations relevant to the validity of the search of the PERSISTENCE and resolve the many conflicts presented by the opinion below.

III

THIS CASE IS IN CONFLICT WITH NUMEROUS PRIOR DECISIONS OF THIS COURT BY CREATING A NEW EXCEPTION TO THE FOURTH AMENDMENT'S REQUIREMENT OF PROBABLE CAUSE PRIOR TO SEARCHES FOR EVIDENCE OF CRIMINAL ACITIVITY.

In the case sub judice, the First Circuit Court of Appeals reversed the District Court's grant of the petitioners' motion to suppress evidence holding that "the fourth amendment allows government officers, who are otherwise authorized, to board and search a vessel on the high seas should they have reasonable and articulable

grounds for suspecting that it is engaged in criminal activity" (A. 27). Based only upon the aberrant decision of the Fifth Circuit in United States v. Williams, supra, the First Circuit specifically abandoned any prior requirement of probable cause to justify non-administrative maritime searches of foreign yachts on the high seas, and instead adopted a standard of reasonable suspicion as the constitutional prerequisite for such searches. The First Circuit thus created a new and unwarranted exception to the fourth amendment's requirement of probable cause for such intrusive searches for evidence of criminal activities. In fact, the court's decision is completely unprecedented since it applied the reasonable suspicion standard to the search of the PERSISTENCE'S crews

living quarters. [12]

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[12] After hearing testimony and reviewing photographs of the PERSISTENCE, the District Court found that the below decks area searched on the PERSISTENCE were the crews' living quarters. (A.50,58 n.6, 79, 89-101). Although this factual determination was not found to be clearly erroneous by the Court of Appeals, the First Circuit nevertheless rejected the fact that the below decks area was a private and personal area for the crew stating:

> [t]he fact that the crew also bunked in the cabin below would not render the cabin off limits to the searching officers on a boat of this size and character, where virtually all shipboard functions might be expected to take place in the cabin area, including stowage of some cargo

(A. 28 at n. 11). Accordingly, the Court of Appeals ignored the plain findings of fact by the trial judge that the below decks area was the living quarters on this sailing sloop. The fact that the quarters were incidently the area chosen to house contraband does not change its character as living quarters or the petitioners' expectations of privacy therein. A house is still a house, and a footlocker is still a footlocker, even if it is incidentally used to store contraband. Additionally, at the time of the search for contraband in the below decks area, there was no topside indication that the cabin was anything (Footnote continued on following page).

See United States v. Williams, supra at 1087 (reasonable suspicion standard only applied to search of a cargo hold and not to living area); United States v. Hicks, 624 F.2d 32, 33-34 n. 2 (5th Cir. 1980) (presuming that probable cause applied to search of living quarters); United States v. Caicedo-Asprilla, 632 F.2d 1161, 1168 (5th Cir. 1980) cert. denied, 450 U.S. 1000 (1981) (probable cause applied to search of living quarters). [13]

(Footnote continued from previous page). but the crew's living quarters. As such, the crew was entitled to the full protection of the fourth amendment. See United States v. Thompson, No. 80-533 (USDC S.Fla July 20, 1981) appeal docketed No. 81-5952 (11th Cir. 1982). It is basic fourth amendment law that a search cannot be justified by what it turns up. United States v. DiRe, 322 U.S. 581, 595 (1932).

[13] Interestingly, the author of the majority opinion in United States v. Williams, supra, Circuit Judge Tjoflat, has twice applied the standard of probable cause to post-Williams searches of living quarters on sailing vessels. See United States v. Hicks, supra; United States v. Caicedo-Asprilla, supra.

It is fundamental constitutional law, as stressed by this Court on numerous occasions and in varying contexts, that absent consent, warrantless searches for criminal violations are per se unreasonable under the fourth amendment unless one of the limited and "narrowly defined" exceptions to this general principle applied. Katz v. United States, 389 U.S. 347, 357 (1967); Coolidge v. New Hampshire, supra; Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). None of the carefully drawn exceptions set forth by this Court apply in this case. [14]

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[14] This case does not involve a valid border search as controlled by United States v. Ramsey, 431 U.S. 606 (1977). As found by both lower federal courts, the search of the PERSISTENCE did not involve a "morally neutral" customs search which might be expected at a point of entry or in customs waters. Nor does this case involve a valid administrative search, a proposition (Footnote contined on following page).

Instead, the First Circuit rejected this Court's requirement that in order for a warrantless search to be reasonable under the fourth amendment it must be based upon probable cause and exigent circumstances, see Carroll v. United States, 267 U.S. 132 (1925), and replaced it with the standard of mere reasonable suspicion to justify searches of living quarters on sailing vessels on the high seas. [15]

(Footnote continued from previous page). also rejected by both lower federal courts. See United States v. Biswell, 406 U.S. 311 (1972). Rather, the search of the PERSISTENCE was for marijuana in an area fifty-five miles from our coast where under common principles of international law, and as expressly provided by the Convention on the High Seas, the PERSISTENCE was entitled to free passage. See discussion supra at 8 et. seq.

[15] It has never been explained why the government allegedly had the time to coordinate transatlantic communications involving numerous governmental offices of the United States and Great Britian, taking no less than an entire day, to seek British cooperation for the search of the PERSISTENCE, yet did not even (Footnote continued on following page.)

Although the reasonable suspicion standard has been applied by this Court to less intrusive police activities such as stop and frisks for weapons, Terry v. Ohio, 392 U.S. 1 (1968), or temporary detentions of persons suspected of having committed a crime pending the execution of a search warrant or brief questioning, Michigan v. Summers, ___ U.S. ___, 101 S.Ct. 2587 (1981) Adams

(Footnote continued from previous page.) attempt to secure the consent of a neutral and detached United States magistrate for a valid warrant for this search for contraband. See Federal Rules of Criminal Procedure, Rules 41(c)(2), 54(b)(2) and 57(b). Cf. United States v. New York Telephone Co., 434 U.S. 159 (1977). The fact that no probable cause existed to search the PERSISTENCE, and therefore no valid search warrant could lawfully issue, is a likely reason why no warrant was sought.

Furthermore, assuming that the warrant requirement applied to searches on the high seas, the court's decision below would lead to the unreasonable conclusion that warrants on the high seas can be issued so long as there exists reasonable suspicion, rather than the express provisions of Rule 41 requiring probable cause.

v. Williams, 407 U.S. 143 (1972), this Court has never permitted full fledged searches for criminal activities, such as was the case here, on grounds other than probable cause. Cf. United States v. Lee, 274 U.S. 559, 563 (1927). Only a heretofore unprecedented expanded interpretation of this Court's decisions can justify the reasonable suspicion standard applied in this case. [16]

Like the Fifth Circuit, the First Circuit has dangerously departed from

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[16] This Court has indicated on numerous occasions that the exceptions to the requirement of probable cause should be narrowly interpreted by the courts. Dunaway v. New York, 442 U.S. 200, 210 (1979); Sibron v. New York, 392 U.S. 40, 60-61 n. 20 (1968); Brown v. Texas, 443 U.S. 47, 50-51 (1979). See also United States v. Streifel, supra, 665 F.2d at 426 (Oakes, J. dissent noting his concern that a continuously widening interpretation of the exceptions, will eventually swallow the fourth amendment ... [and] become a general search warrant putting, in the words of James Otis, "the liberty of every man in the hands of every petty officer").

well established constitutional doctrines in the interests of expediency. See United States v. Williams, supra at 1087-88. This Court aptly recognized in Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973) that the Supreme Court that sat during the period in our history of liquor prohibition "resisted the pressure of official expedience against the guarantee of the Fourth Amendment." While liquor smuggling undoubtedly caused law enforcement problems, this Court refused to sanction an exception to the fourth amendment for searches based upon less than probable cause. Carroll v. United States, supra.

With this case, the Court is called upon to decide whether the long standing rules and constitutional guarantees which have protected our liberty and endured despite law enforcement

pressures to debilitate them brought on by problems in liquor prohibition and illegal immigration enforcement, must now give way to efforts to enforce the marijuana prohibition laws.

## CONCLUSION

This Court has yet to decide any of the precise issues raised in this Petition, or review any of the burgeoning lines of decisions involving searches of foreign sailing vessels. This case merits review because the opinion below constitutes the most far-reaching departure from fourth amendment guarantees and jurisprudence of any of the high seas search decisions. The new exception to the fourth amendment carved out by the First Circuit below has never been sanctioned by this Court and should now be repudiated.

Respectfilly submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 1982 three true and accurate copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit was mailed, first class, postage prepaid, to the Office of the Solicitor General, Department of Justice, Washington, D.C.

John Kenneth Zwerling, msl

JOHN KENNETH ZWERLING
Record Counsel

# Appendix

## APPENDIX

A. United States v. Green,
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B. United States v. Green,
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C. United States v. Green,
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D. United States v. Green,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 81-1281

UNITED STATES OF AMERICA,
Appellant,

v.

ALBERT GREEN, ET AL.,
Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER,
U.S. District Judge]

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Before
COFFIN, Chief Judge
CAMPBELL, Circuit Judge
and WYZANSKI,* Senior District Judge

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John H. LaChance, Assistant United States Attorney, with whom Edward F. Harrington, United States Attorney was on brief, for appellant.

John Kenneth Zwerling and Marvin Miller, with whom Michael S. Lieberman, Zwerling & Shapiro, P.C., Jay Colangelo, and Ronald Chisolm were on brief, for appellees.

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*Of the District of Massachusetts, sitting by designation.

February 19, 1982

CAMPBELL, Circuit Judge. On April 11, 1980, the Coast Guard Cutter Reliance encountered the Persistence, a 52-foot sloop flying a British flag, on the high seas, 55 miles east of Provincetown, Massachusetts. Several factors made the captain of the Reliance suspicious of the Persistence, and he eventually asked for and received British consent to board the vessel. A boarding party went to the Persistence. When they opened the main hatch to go below in order to verify the vessel's "main beam" (registration) number, they discovered that the lower compartment was filled with bales of what turned out to be marijuana, five tons in all. The members of the crew, all United States citizens, were arrested and are the defendants-appellees in this action.

The Persistence was seized and brought to Boston.

The defendants were charged with conspiracy to import marijuana, in violation of 21 U.S.C. §§952(a), 963, and conspiracy to possess marijuana with intent to to distribute, in violation of 21 U.S.C. §§841(a)(1), 846. The defendants moved to suppress the marijuana, and a hearing was held. The district court originally denied the motion but on reconsideration after further hearing, granted the motion to suppress on the ground that the warrantless search below decks violated the fourth amendment. The government appeals pursuant to 18 U.S.C. § 3731. We reverse.

## I. THE FACTS

The Reliance initially encountered the Persistence early on the morning of April 11, 1980. She was moving slug-

gishly and appeared lower in the bow than normal. These facts indicated that she was probably carrying something heavy on board. The vessel was listed under "category 3" by the Drug Enforcement Agency's El Paso Intelligence Center, meaning that she is suspected of illegal activities and should be boarded if possible.

The Reliance attempted to contact the Persistence, but no one answered for two hours, although a man was seen in the cockpit. A man finally answered and identified himself as "Charles Daniels" (it was later discovered that no one by that name was on board). He said the vessel was the Persistence, her home port was Guernsey, her last port had been Bermuda, and her next port was Portland, Maine. "Daniels" expressed

interest in a hurricane he said was in the area they had just left; the captain of the Reliance (Commander Bates) thought this unusual, as the hurricane was in the Caribbean, not near Bermuda.

Bates contacted his operational commander and asked him to contact the British government to ask permission to board. He requested permission to board from "Daniels," who refused. The U.S. State Department then sought permission to board from the British government. That afternoon, the State Department received a telegram from the U.S. Embassy in London, stating that the British authorities were "nearly certain" the Persistence was of U.K. registry, but to confirm it, the "carved in the beam" number should be checked. More importantly, it further stated that "the U.K. authorities have

granted authority to board and search subject vessel."

At 3:00 p.m. on April 11, Bates was informed of the British consent and told to board the vessel for purposes of determining and verifying its registration and determining the nationality of the persons on board. Bates informed the Persistence of the British consent; one of the defendants replied, "Fine, come aboard," and an armed boarding party was sent over. Bates instructed them to check the registration number and verify it by locating the main beam number. The defendants -- the only persons on board -- presented their identification to the boarding party, as well as the vessel's papers, and a provisional U.K. registration (the vessel had earlier been registered in the United States). When asked to point out

the main beam number, defendant Kincaid indicated a board on deck and then pointed to some seat cushions. It was not in either of these places, and indeed, it was unreasonable to think it could be, as the number is always placed on a permanent structural part of the vessel. Kincaid repeatedly said that it was not below deck, but when told that the boarding party would have to go below to find the number, he assented.[1] He then slid open the hatch, and said, "Looks like we've made history."

When the hatch was opened, plastic and burlap wrapped bales were visible, filling the lower compartment to within three feet of the overhead. The smell of marijuana was present. A search was

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[1] The district court originally found that Kincaid had consented to the search, but on reconsideration and after a further evidentiary hearing, it vacated this finding.

made for the main beam number, but it could not be found. A bale was opened and tested positively as marijuana. Another search eventually revealed a main beam number, which was the number of the vessel's previous U.S. registry. The number would not have been visible from on deck.

Defendants argue that the Coast Guard's boarding and subsequent search of the Persistence violated a treaty, the Convention on the High Seas, opened for signature April 28, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962), [2] was not authorized by any federal statute, and violated the fourth amendment. For these reasons, they say, the evidence discovered on board was properly suppressed.

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[2] Both the United States and Great Britain are signatories to this treaty.

## II. CONVENTION ON THE HIGH SEAS

Turning first to the alleged treaty violation, we agree with the district court that the consent of the British government vitiated any violation of the Convention. Article 6 of the Convention on the High Seas provides inter alia that a vessel on the high seas is under the exclusive jurisdiction of the nation under whose flag she sails. [3] The

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[3] Article 6 provides in pertinent part

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.....

Defendants also contend that Article 22 was violated. It provides in pertinent part that

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> (a) That the ship is engaged in piracy;
>
> or

(Footnote continued on following page).

unauthorized interference with a vessel by a foreign state is prohibited by Article 6 unless it comes within a recognized exception. Defendants argue that the boarding of the Persistence violated Article 6.

As a preliminary matter, we face the question whether Article 6 is "self-executing": that is, whether it

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(Footnote continued from previous page).

(b) That the ship is engaged in the slave trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

* * * *

This article, however, does not function as a separate prohibition of interference. Rather, it specified some of the "exceptional cases expressly provided for ... in these articles" which are exempted from the prohibition of Article 6. See United States v. Williams, 617 F.2d 1063, 1076 (5th Cir. 1980)(en banc); Note, Coast Guard Authority, infra, 13 N.Y.U.J. Int'l L.&Pol. at 255 n.24. Defendants are therefore incorrect in maintaining that Article 22 provides a separate ground for holding the boarding illegal.

has become part of cur domestic law enforceable by private individuals without separate legislation. See Whitney v. Robertson, 124 U.S. 190, 194 (1888). If so, its violation would prevent out courts from exercising jurisdiciton over the vessel and would provide a basis for suppression of evidence discovered during an unlawful seizure. See Cook v. United States, 288 U.S. 102 (1933); Riesenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price? 74 Am.J.Int'l L. 892, 894 (1980). [4] If Article 6 is not self-executing, on the other hand,

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[4] Cook is an exception to the Ker-Frisbie doctrine that the illegal arrest of a defendant does not deprive the courts of jurisdiction. Frisbie v. Collins 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); see Autry v. Wiley, 440 F.2d 799, 801-02 (1st Cir.), cert. denied, 404 U.S. 886 (1971). The exception arises when the United States undertakes through a treaty to limit its own authority to seize a vessel. See Cook, 288 U.S. at 121.

evidence seized in violation of it would not have to be suppressed, because no legislation has been passed to make it part of "the Law of the Land" within the meaning of the Constitution. U.S. Const. Art. VI, cl.2.

Whether Article 6 is self-exeucting is a difficult issue. The Fifth Circuit, in what is apparently the only case to address the issue directly, has held that it not self-executing. See United States v. Postal, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979). Several commentators have expressed the opposite view. See Riesenfeld, supra; Note, "Smoke on the Water": Coast Guard Authority to Seize Foreign vessels Beyond the Contiguous Zone, 13 N.Y.U.J. Int'l L.& Pol. 249, 302-16 (1980) [hereinafter cited as Coast Guard Authority]; Comment, Treaties -- Article 6 of the Convention on the High

Seas is Not Self-Executing, 55 Notre Dame Law. 292 (1979); Comment, United States v. Postal, Lost on the High Seas, 31 Mercer L. Rev. 1081 (1980). We do not reach this issue, however, because even assuming arguendo that Article 6 is self-executing, it was not violated in this case because the British government consented to the boarding. [5]

Great Britain's consent waived its rights under Article 6. Given this

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[5] Defendants claim that the telegram from the U.S. Embassy which stated that "the U.K. authorities have granted authority to board and search subject vessel" was hearsay and was not admitted for its truth but only to show the fact of the communication. But the district court found that it was admissible for its truth under Fed.R. Evid. 803(24) and relied on it as evidence of the British consent. Moreoever, the transcript indicates that the defendants' objection to the telegram was not directed to the consent portion but to the part dealing with the identification number. The telegram was therefore properly admitted, and properly relied upon, as proof of British consent to the boarding. There is nothing in the record suggesting that the British may not in fact have consented.

waiver, the individuals on board the vessel cannot successfully argue that the treaty was violated. While we are not aware of any other court decision clearly disposing of this issue in a holding, other courts have implicitly recognized the correctness of this position, and commentators have explicitly endorsed it. See United States v. Dominguez, 604 F.2d 304, 308 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); United States v. Williams, 617 F.2d 1063, 1075, 1090 (5th Cir. 1980)(en banc); Id., at 1092 (Roney, J., specially concurring); Riesenfeld, supra, at 903 n.56; Coast Guard Authority, supra, at 328 ("As long as the flag state consents expressly to Coast Guard searches of its vessels, ... [subsequent] seizures do not violate article 6, because the rule of non-interference is not breached when the

foreign flag state vessel receives permission from the state whose ship it searches."); see also United States v. Conroy, 589 F.2d 1258, 1268 (5th Cir.), cert. denied, 444 U.S. 831 (1979); United States v. Rubies, 612 F.2d 397, 403 (9th Cir. 1979), cert. denied, 446 U.S. 940 (1980). The practice of obtaining prior consent of the foreign flag state is apparently a fairly common one, see United States v. Streifel, No. 81-1091, slip op. at 5368 (2d Cir. Nov. 23, 1981); United States v. May May, 470 F.Supp. 384,388 (S.D. Tex. 1979); Riesenfled, supra, at 903 n.56; Coast Guard Authority, supra, at 330, and we see nothing to suggest that it is improper. The policy behind Article 6 is that of ensuring freedom of access to the high seas by preventing arbitrary interference with vessels of one state by those of another. See M. McDougal

and W. Burke, The Public Order of the Oceans, 860-75 (1962). Permitting the flag state to authorize boarding by a foreign vessel in no way interferes with this policy; indeed, it can only further the recognition in Article 6 of the flag state's ability to exercise authority over its vessels. [6]

III. STATUTORY AUTHORITY

As the boarding of the Persistence did not violate the convention on the

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[6] While we think it clear that Article 6 implicitly recognizes that the flag state may authorize boardings as an incident of its jurisdiction, we also interpret Article 6's exception for "treaties" as further support for our holding.

> A reading of the Convention on the High Seas in its pristine, black-letter absolutism would be seriously misleading .... Neither international treaties nor succeeding articles of the Convention exhaust the [exceptions to exclusive jurisdiction].

McDougal and Burke, supra, at 875. Consent to a boarding may thus fairly be characterized as within the treaty exception in Article 6. Coast Guard Authority, supra, at 329.

High Seas, we turn next to the issue of the Coast Guard's Authority under United States law to board and search. We find such authority in various provisions of the Anti-Smuggling Act of 1935, Aug. 5, 1935, c. 438, 49 Stat. 517 et seq., codified at 19 U.S.C. §§1701-1711, and amending other sections of titles 19 and 46; see note to 19 U.S.C. §1711.

We begin with 19 U.S.C. §1581(h), which recognizes that a foreign government may agree to a boarding and search that would otherwise be in violation of a treaty:

> (h) The provisions of this section shall not be construed to authorize or require any officer of the United to enforce any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authori-

ties of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government. [Emphasis added.]

Britain's consent here constituted just such a "special arrangement." [7] See

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[7] Defendants misconstrue this position as the reliance on Great Britain's consent -- which is essentially a negative statement that they do not object -- to provide affirmative authority for the boarding where none exists in United States law. To the contrary, the authority is explicitly provided by our own laws, as set forth in the text. The British consent merely brings these laws into operation.

This observation also disposes of defendants' argument that the British government may not have the power under its own laws to authorize boardings of its flag vessels, because it is the American laws, not the British, which authorize the boarding. Defendants have presented nothing to show that the British government may not, consistently (Footnote continued on following page).

United States v. Dominquez, 604 F.2d at 308. As we have made clear supra, the convention on the High Seas permits boardings when the flag state consents, and thus there is no conflict between our domestic statute and the treaty.

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(Footnote continued from previous page.
with its own laws, assent to a boarding. We also note that the United States authorities are entitled to rely on the apparent authority of representatives of foreign governments. See Restatement (Second) of the Foreign Relations Law of the United States §123.

Defendants also argue that the inquiry of the British government initiated by the State Department was an invasion of the President's power to conduct foreign relations in the absence of an explicit delegation of this specific authority, which they claim does not exist. We find nothing to suggest, however, that the State Department did not act properly here in exercising its delegated authority to manage foreign affairs. See 22 U.S.C. §2656. The President has not complained of any unlawful usurpation of his role by the State Department. Nor is the State Department here making law in contravention of Congress' powers. To the contrary, the Department is acting pursuant to Congress' explicit recognition that boarding of a foreign vessel may take place under an appropriate "special arrangement."

Our next step is to note that 19 U.S.C. §1587(a) establishes that the Coast Guard may board and examine vessels pursuant to a section 1581(h) special arrangement and applies the provisions of section 1581 generally to the boarding and subsequent search:

> (a) Any hovering vessel, or any vessel which fails (except for unavoidale cause) at any place within the customs waters or within a customs-enforcement area established under the Anti-Smuggling Act, to display lights as required by law, or which has become subject to pursuit as provided in section 1581 of this title, or which being a foreign vessel to which subsection (h) of section 1581 of this title applies, is permitted by special arrangement with a foreign govern-

ment to be so examined without the customs waters of the United States, may at any time be boarded and examined by any officer of the customs, and the provisions of said section 1581 shall apply thereto .... [Emphasis supplied.]

Finally, 19 U.S.C. §1581(a), made applicable by section 1587(a), provides,

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anit-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and

> search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Under 19 U.S.C. §1401(i), officers of the Coast Guard are brought within the definition of "officer of the customs." See also 14 U.S.C. §143. The Coast Guard is therefore empowered to board and search vessels by virtue of this statute.

We thus find in these statutes ample authority for the Coast Guard to board and search a foreign flag vessel on the high seas when the flag state consents. [8] Such authority is con-

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[8] Because of our reliance on these statutes, we need not consider whether 14 U.S.C. §89(a), which provides that officers of the Coast Guard "may at any time go on board of any vessel subject (Footnote continued on following page).

sistent with United States obligations under the Convention on the High Seas, see discussion supra, and therefore we conclude that the boarding of the Persistence met the requirements of both the statutes and treaties of the United States. [9]

(Footnote continued from previous page). to the jurisdiction, or to the operation of any law, of the United States ...," would also authorize the boarding of the Persistence. The Fifth Circuit has held that section 89(a) provides the Coast Guard with authority to conduct searches of foreign vessels. United States v. Williams, 617 F.2d at 1076; United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).

[9] Defendants also argue that any authority the Coast Guard might have was taken away by the "Mansfield Amendment," 22 U.S.C. §2291(c)(1), which provides in pertinent part that

> Notwithstanding any other provision of law, no officer of employee of the United States may engage or participate in any direct police action in any foreign country with respect to narcotics control efforts.

Defendants cite traditional principles of international law to suggest that a foreign flag vessel is part of the territory of its flag state, and thus a "foreign country" within the meaning of this statute. We doubt, however, that (Footnote continued on following page).

IV. FOURTH AMENDMENT

Finally, defendants argue that the boarding, and, as the district court in

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(Footnote continued from previous page). the Mansfield Amendment was aimed at preventing United States authorities from taking otherwise lawful measures in international waters off our coasts. In any case, the legislative history of the provision makes it clear that it was only intended to "insure that U.S. personnal do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country." S. Rep. No. 94-954 at 55, reprinted in [1976] U.S. Code Cong. & Ad. News, 1373, 1431. Given Great Britain's consent to the boarding, such was not the case here. The statute was not violated.

Finally, defendants argue that a State Department regulation, 22 C.F.R. §83.7, prohibits the boarding and search. The regulation states that "[u]nder the general principles of international and maritime law," crimes committed on the high seas "are cognizable only in the courts of" the flag state. But the regulation -- promulgated in 1957 -- cannot negate the extraterritorial effect of statutes such as the narcotics laws whose violation is charged here. Moreover, the regulation by its terms prohibits none of the actions taken by either the Coast Guard or the State Department. It appears to function simply as a source of information for State Department officials.

fact ruled, the search, of the Persistence violated the fourth amendment. The fourth amendment prohibits unreasonable searches and seizures. We can perceive no violation here.

As we have noted in past cases, the circumstances and exigencies of the maritime setting afford people on a vessel a lesser expectation of privacy than in their homes, obviating the usual fourth amendment requirements of a warrant. See, e.g., United States v. Hilton, 619 F.2d 127, 131 (1st Cir.), cert. denied, 449 U.S. 887 (1980). Heretofore, decisions in this circuit have focused on the constitutionality of maritime searches under a document and safety inspection rationale, but in our most recent opinion, United States v. Arra, 630 F.2d 836 (1st Cir. 1980), we noted, without expressly adopting, the Fifth Circuit's "reasonable suspicion"

standard as recently set forth en banc in United States v. Williams, 617 F.2d 1076, 1084. Under the latter standard, authorities may constitutionally stop, board, and search a vessel if they possess reasonable and articulable grounds for suspecting that the vessel or those on board are engaging in criminal activities such as drug smuggling. Accord United States v. Streifel, No. 81-1091, slip op. (2d Cir. Nov. 23, 1981) (reaching only the issues of stopping and boarding). We think it now appropriate to indicate our approval of the Williams reasonable suspicion standard, and, in that respect, to withdraw our dicta, made prior to the Fifth Circuit's holding in Williams, that consent or probable cause would be required to justify a non-administrative maritime search. Hilton, 619 F.2d at 131. We now hold that, in addition to

permitting proper administrative searches, the fourth amendment allows government officers, who are otherwise authorized, to board and search a vessel on the high seas should they have reasonable and articulable grounds for suspecting that it is engaged in criminal activity. [10] Our present holding is not to be understood as giving officers carte blanche to search living quarters or personal effects, such as footlockers. The Fifth Circuit in Williams left open what degree of cause might be deemed reasonable under the fourth amendment in such circumstances, 617 F.2d at 1087 n.26, and we agree that consideration of this should wait until

[10] We might add that we are aware of no cases dealing with searches and seizures of vessels that enunciate a standard under which the boarding and search of the Persistence would, on the present facts, be unconstitutional or otherwise require the suppression of the evidence discovered.

a future time.[11]

In this case, the officers of the Reliance had reasonable and articulable grounds for suspecting that the Persistence was smuggling marijuana. In April 1980, a Coast Guard helicopter had surprised the Persistence (a 52-foot ocean racing sloop) in a rendezvous with a fishing vessel. The ships had taken off in different directions. A different Coast Guard cutter had caught up with the Persistence later that day, boarded, and found a man who was the subject of a Drug Enforcement Administration warrant. Three days

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[11] We see no merit to the argument that the search here intruded on any such specially private and personal areas. The fact that the crew also bunked in the cabin below would not render the cabin generally off limits to searching officers on a boat of this size and character, where virtually all shipboard functions might be expected to take place in the cabin area, including stowage of some cargo.

later, the Coast Guard had located the fishing vessel in New York with marijuana residue in the hold. [12] When the Reliance sighted the Persistence in August, she was riding sluggishly, low in the water, and heavy in the bow. Moreover, she did not respond until after two hours to the Coast Guard's efforts to hail her by radio. The response then consisted of Daniels' internally contradictory references to Bermuda and a hurricane. These facts, when taken together, gave the officers a reasonable and articulable suspicion that the Persistence was carrying marijuana below deck. The marijuana was therefore properly discovered and pro-

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[12] The foregoing facts were not relayed in full detail to the crew of the Reliance. Rather, they were subsumed in the conclusion (which was given to the Reliance) that the Persistence was a "category 3" drug suspect of the El Paso Intelligence Center list.

perly seized and should not have been suppressed.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 81-1281

UNITED STATES OF AMERICA,
Appellant,

v.

ALBERT GREEN, ET AL.,
Defendants, Appellees.

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Before Coffin, Chief Judge,
Campbell, Circuit Judge,
and Wyzanski,* Senior District Judge.

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MEMORANDUM AND ORDER

Entered March 12, 1982

The petition for rehearing presents nothing not already considered by this court. The telegram was properly admitted and relied upon as proof of the British consent (see slip op. at 6 n. 5; see also n. 7).

The objection based on a purported search of "living quarters" is spurious. No search of private sleeping areas or

personal effects was involved. Slip op. at 12 n. 11. The below-deck areas were, insofar as appears, multipurpose. Moreover, the bales of marijuana were in plain view once the hatch was opened; no search was thereafter required to locate the contraband.

Petition denied.

By the Court,

DANA H. GALLUP, Clerk.

By _____
Chief Deputy Clerk

---

* Of the District of Massachusetts, sitting by designation.

[cc: Messrs. LaChance, Chisholm, Miller, Lieberman & Zwerling.]

APPENDIX C

Office of the Clerk
United States Court of Appeals
for the First Circuit

April 20, 1982

To Counsel, West Publishing Company, Massachusetts Lawyers Weekly, Commerce Clearing House and National Center for Automated Information Retrieval.

Re: No. 81-1281.
U.S. v. Albert Green et al.

Gentlemen:

Please make the following corrections in the above captioned opinion which was released on February 19, 1982:

On Page 1, first line, the word "April" should be deleted and the word "August" substituted.

On Page 2, on the second line under the paragraph entitled The Facts the word "April" should be deleted and the word "August" substituted.

On page 3, eleven lines from the

top, the word "April" should be deleted and the word "August" substituted.

Sincerely yours,

DANA H. GALLUP, Clerk.

By_____
Chief Deputy Clerk

FPS/cb

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APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, *
Plaintiff, *
*
v. * NO.80-274-S
*
ALBERT J. GREEN, ET AL., *
Defendants. *

MEMORANDUM AND ORDER

February 18, 1981

SKINNER, D.J.

Defendants, Green, Kincaid, and Twomey were indicted on three counts of having violated the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 et seq. In an earlier memorandum and order, United States v. Green, Criminal No. 80-274-S (Dec. 12, 1980), I dismissed Count III. The two remaining counts charge the defendants with conspiracy to import marijuana into the United States in violation of 21 U.S.C. §§952(a) and 963 and with conspiracy to possess mari-

juana with intent to distribute it in violation of 21 U.S.C. §§841(a)(1) and 846.

The case is presently before me on several motions. Defendants seek to suppress evidence and to have the case dismissed. Defendants also seek to strike an exhibit introduced into evidence during the hearing on the motion to suppress. Finally, defendants request this court to issue a letter rogatory.

I. MOTION TO STRIKE EXHIBIT 8

Defendants seek to exclude exhibit 8 from the evidence introduced at the hearing on the motion to suppress. Exhibit 8 is a telegram from the United States Embassy in London to the United States Secretary of State. During the hearing on the motion to suppress, the Assistant U.S. Attorney offered exhibit 8 as proof that the British government

had not objected to the Coast Guard boarding the PERSISTENCE.

The telegram reads:

1. The U.K. authorities are nearly certain that the S/V Persistence is of U.K. Registry. In order to confirm U.K. Registry, however, the number 387935 should be "carved in the beam". The U.K. authorities currently have a 23 gross ton vessel with subject name registered in Guernsey to C and W Enterprises Lmtd., L A Plaiderie, St. Peter Port, Guernsey. According to U.K. authorities, the registration in Guernsey took place last month and the documents have not yet arrived at the Central U.K. Registry.

2. Given the facts listed in REFTELS, the U.K. authorities have granted authority to board and search subject vessel. If vessel is definitely of U.K. Registry, and if contraband is found, U.K. agrees with procedure outlined in option two of REFTEL A. However, it cannot agree to prosecution of the crew until after it knows the results of the search, i.e., the U.S. must be prepared to accept U.K. legal views regarding the disposition of the case. Brewster.

In my opinion, a telegram from our Embassy in London to the State Department, a form of communication routinely relied upon by our government, is sufficiently reliable to be admissible under Fed. R. Evid. 803(24) and meets all the requirements thereof. The defendants were provided with a copy well in advance of the hearing. The British responses are not being offered to prove the matters asserted therein, moreover, but merely as evidence of the communication itself. Fed. R. Evid. 801(c). Accordingly, I rule that exhibit 8 was properly admitted and deny the motion to strike it.

II. MOTION TO SUPPRESS EVIDENCE

I find the following facts: On August 11, 1980, at approximately 6:30 a.m., the United States Coast Guard Cutter RELIANCE encountered a 50 foot

ocean racing sloop under sail on the high seas 55 miles east of Provincetown. After closer inspection of the vessel, Commander Bates, captain of the RELIANCE, and Lieutenant Schenck, the duty officer, identified the sailboat as the PERSISTENCE. The PERSISTENCE was flying a British flag.

Commander Bates, pursuant to standard Coast Guard procedure, attempted to contact the PERSISTENCE by radio on Channel 16 FM and 218 HF, the international distress frequencies. Bates could see a man in the cockpit of the PERSISTENCE. Although this man frequently looked over his shoulder, there was no response on the radio to the RELIANCE's attempted contacts.

As the RELIANCE drew closer to the PERSISTENCE, both Bates and Schenck observed that the PERSISTENCE was acting sluggishly as she plowed through

the three to five foot seas. In Bates' experience, [1] this indicated that the sailing vessel had something heavy on board. Two similar sailing vessels which Bates had previously seized with large quantities of marijuana on board had been behaving in a similar fashion. In Schenck's experience, [2] the vessel appeared to be heavier in the bow than normal. Photographs introduced at the suppression hearing which picture the PERSISTENCE at the time she was escorted into Boston Harbor show the bow very low in the water.

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[1] Commander Bates is a graduate of the United State Coast Guard Academy. He has a total of seven years duty at sea. He has boarded several vessels and has seized vessels, including three sailboats. In addition, Bates has patrolled several sailing regattas.

[2] Lieutenant Schenck has boarded 30 to 35 sailboats and has seen 50 to 60 sailboats during his sea duty.

Commander Bates examined a list compiled by the Federal Drug Enforcement Agency's El Paso Intelligence Center (EPIC) which revealed that the PERSISTENCE was included as a category 3 vessel. Vessels designated as category 3 are suspected of participating in illegal activities. According to Bates, a category 3 vessel should be routinely boarded for inspection.

The PERSISTENCE had originally been placed on the list as a category 3 vessel on April 18, 1980 by Special Agent James N. Hammitt of the Coast Guard. Hammitt placed the PERSISTENCE on the list because, on April 10, 1980, immediately after a Coast Guard aircraft had spotted the PERSISTENCE near a fishing vessel off the coast of New York, both vessels had broken apart and headed in different direction (sic).

Although the Coast Guard Cutter UNIMAK intercepted and boarded the PERSISTENCE and found no violations, Hammitt later learned that a crew member of the PERSISTENCE was subject to an arrest warrant. This crew member was removed from the PERSISTENCE and arrested during April 1980. The category 3 status was renewed on July 1, 1980, because an inspection of the fishing vessel which had been sighted near the PERSISTENCE revealed marijuana residue in the hold. In addition, although defendant Kincaid had informed the UNIMAK boarding party that he was delivering the boat to new owners in Bermuda, Hammitt had been informed by Customs in Bermuda that Kincaid had still been on board when it left Bermuda on May 2, 1980. The PERSISTENCE returned to Bermuda in June and departed again on June 30, 1980.

An additional reason for Hammitt's renewal of the category 3 status for the PERSISTENCE was the fact that the former owner of the PERSISTENCE had not complied with the requirements of 46 U.S.C. §808 which deals with the sale of a domestic vessel to a foreigner. Failure to comply with this statute results in forfeiture of the vessel to the United States.

Bates requested and received confirmation that the PERSISTENCE was still listed under category 3. Bates was aware that the PERSISTENCE had been observed near a fishing vessel upon which marijuana residue had later been discovered. He was also aware that the PERSISTENCE had been boarded subsequent to the time that it had been observed near the fishing vessel and that no marijuana had been discovered, but he was not aware that the purported

transfer of the PERSISTENCE to foreign ownership had been accomplished without compliance with 46 U.S.C. §808.

Approximately two hours after the RELIANCE had initially attempted to establish radio contact with the PERSISTENCE, someone aboard the PERSISTENCE responded on Channel 16. This individual identified himself as "Charles Daniels" of La Mirada, California. [3/] He stated that everyone else on board was asleep, that he was the only one at the helm, and that he hadn't had an opportunity to get to the radio. He indicated that the name of the vessel was PERSISTENCE, her home port was Guernsey, her last port had been Bermuda, and her next port was Portland, Maine.

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[3/] No individual named Charles Daniels was found on the PERSISTENCE.

"Daniels" expressed interest in a hurricane, stating that he had just left the area where the hurricane was located. Bates thought this statement was unusual since the hurricane was in the Caribbean, yet "Daniels" had stated that he was coming from Bermuda.

Bates relayed these events by radio to his operational commander (Commander, Atlantic Area) and suggested that the British government be contacted and asked whether they would grant permission for the Coast Guard personnel to board the PERSISTENCE. Bates was ordered to maintain overt surveillance of the PERSISTENCE by his operational commander.

Bates contacted the PERSISTENCE again and asked if they would consent to a boarding. "Daniels" responded that they would not.

While the RELIANCE continued to watch the PERSISTENCE, the State Department sought permission to board the PERSISTENCE from the British Government. On April 11, 1980, (sic) the State Department received the telegram referred to above from the United States Embassy in London which stated that the British government had granted authority to board and search the PERSISTENCE. The State Department advised the Coast Guard of the receipt of this telegram

At 3 p.m. on April 11, 1980, (sic) Bates was informed by the Coast Guard Operational Commander that the British would not object to the Coast Guard boarding the PERSISTENCE. Bates was told that the purpose for boarding the vessel was to determine the registration of the vessel, to verify its registration, and to determine the

nationality of the people on board. Bates informed the PERSISTENCE that the British government had consented to a Coast Guard boarding. One of the defendants responded, "Fine, come aboard", and also asked what he should do. (Tr. at 32). Bates told him to head into the wind. Bates testified that if the defendants had not cooperated, they still would have attempted to board the PERSISTENCE. At the time that the Coast Guard began preparations for boarding, the .55 caliber machine gun was manned.

The boarding party, which was armed, consisted of Lt. Schenck, Ensign McCann and Petty Officer Reed. Bates instructed them to check the registration number of the vessel and to verify it by locating the main beam number. The main beam number is the registration number marked permanently in or on

a structural portion of a registered vessel. Lt. Schenck was the senior boarding officer and went aboard the PERSISTENCE first, followed by McCann and Reed. An individual identified as the defendant Kincaid presented the vessel's papers, a provisional registration from the British government, and his identification to Schenck. The two other defendants were also aboard and provided their identification. While Schenck was examining the documents, Ensign McCann asked Kincaid to show him the main beam number. Kincaid pointed to a board on the deck and said it was there. On the board was inscribed NRT 13.5. McCann told Kincaid that the number could possibly be his net registered tonnage, but was certainly not his main beam number. Kincaid then pointed to some

seat cushions, but these also did not have the main beam number.

McCann told Kincaid that the main beam number would be located on a permanent part of the vessel below deck. Kincaid repeatedly stated that the number was not below deck, but was unable to show the boarding party where it was located.

When Schenck finished reviewing the documentation, he informed Kincaid that they would have to go below to find the main beam number. Kincaid responded, "Fine, go ahead" or "Okay". Kincaid then "slid open the top of the hatch and looked in and looked at [McCann] and said words to the effect, 'Looks like we've made history.'" (Tr. 180). When the hatch was opened Schenck smelled what he believed to be marijuana. McCann looked inside the hatch and saw burlap wrapped bales with

inner plastic linings. McCann had seen these types of bales on another sailing vessel which had been carrying marijuana. The bales filled the immediate lower compartment to within three feet of the overhead. In addition, the stateroom and the forward crawl compartment contained bales. McCann went down below to search for the main beam number, but could not find it. Schenck then ordered McCann to open a bale. McCann found a green leafy material inside which tested positively for the presence of THC, the active ingredient of marijuana.

McCann contacted the RELIANCE and informed them that the boarding party was unable to locate the main beam number because it was apparently blocked by many bales of green leafy materials which tested positively for THC. The boarding party was instructed

to remain on board and to continue to search for the main beam number. McCann again went below and after crawling through narrow spaces among the bales of marijuana discovered a main beam number [4] on the inside edge of the forward hatch. This number had not been visible from the deck due to the partially opaque hatch cover. The number was relayed back to the RELIANCE.

A short time later, the boarding party was instructed to seize the PERSISTENCE on behalf of the British government and to arrest the crew for violations of United States law. The crew members were read their rights and the PERSISTENCE was brought to Boston. There were approximately five tons of

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[4] This turned out to be the number of the vessel's previous United States registry.

marijuana on board. All crew members are United States citizens.

A. Convention on the High Seas

Defendants seek to suppress the five tons of marijuana that were seized on board the PERSISTENCE. They assert that the boarding of the PERSISTENCE violated Article 6 and 22 of the Convention of the High Seas, September 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, and, therefore, that the exclusionary rule should be applied.

Article 6 of the Convention on the High Seas provides, in part, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." 13 U.S.T. at

2315. [5]

This provision of the convention was violated, but the treaty signatory whose flag was violated, the United Kingdom, has stated that it has no objection and apparently authorized the seizure. The question is then, do these defendants have standing to complain if Brittania waives the rules? A treaty that has not been given effect by statute and is not self-executing does not have the force of domestic law, notwithstanding Article 6 of the

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[5] The exceptional cases provided in Article 22 do not apply. Article 22 also contains an express prohibition against boarding a merchant ship except in these circumstances. The PERSISTENCE is not a merchant ship in the common meaning of the term. Counsel asserts without citation that the British do not distinguish between merchant vessels and yachts in their vessel registry, but it is the general meaning of the term rather than the practice of one of the signatory nations that should govern the interpretation of the Convention.

Constitution. Foster v. Nielson, 27 U.S. 253, 311 (1829). The Convention on the High Seas has not been given effect by statute and is not self-executing; the defendants may not rely on it to establish the illegality of the search and seizure of the PERSISTENCE to require the suppression of the fruits thereof. United States v. Postal, 589 F.2d 862, 884 (5th Cir. 1979).

B. Fourth Amendment

Defendants argue, however, that the actions of the Coast Guard violated their Fourth Amendment rights. They suggest that there was no authority for the Coast Guard to board the PERSISTENCE, that a warrantless search was not justified, and that there was neither probable cause nor reasonable suspicion to conduct a search.

Under 14 U.S.C. §89(a), the Coast Guard is authorized "to go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necesary force to compel compliance." A foreign vessel which violates United States law is "subject to ... the operation of [the laws] of the United States", United States v. Williams, 617 F.2d 1063, 1076 (5th Cir. 1980) (en banc), even though the violation occurs on extra-territorial waters. United States v. Postal, 589 F.2d at 884. Thus, the United States Coast Guard has authority under 14 U.S.C. §89(a) to board and search a foreign vessel on the high seas which is violating federal laws.

This statutory authorization is subject to the strictures of the Fourth Amendment. United States v. Ramsey, 431 U.S. 606, 615. The defendants, although they were on a foreign registered vessel, are entitled to the protection extended by the Fourth Amendment. United States v. Williams, 617 F.2d at 1093 (concurring opinion by Roney, J.).

There are two Coast Guard actions which defendants argue have violated the Fourth Amendment. These are the boarding of the PERSISTENCE and the subsequent search below deck.

1. Seizure

Since the boarding by the Coast Guard restrained the freedom of movement of the PERSISTENCE and was accompanied by a display of force, the manning of the RELIANCE's machine gun, there was arguably a seizure of the

PERSISTENCE even though there was some evidence of consent. See United States v. Mendenhall, ____ U.S. ____, 48 U.S.L.W. 4575, 4578 (1980).

The degree of protection afforded to the occupants of a vessel by the Fourth Amendment has been analogized to the quantum of protection provided to persons in an automobile. United States v. Zurosky, 614 F.2d 779, 790 (1st Cir. 1979); United States v. Hilton, 619 F.2d 127, 131 (1st Cir. 1980). A reasonable suspicion of a violation of law is required before a law enforcement officer can stop an automobile and detain the driver in order to check his license and the registration of the car. Delaware v. Prouse, 440 U.S. 648, 663 (1979). By analogy, reasonable suspicion is also required before the Coast Guard can stop and board a foreign vessel on the

high seas. See United States v. Williams, 617 F.2d at 1084. [6]

The boarding of a foreign vessel on the high seas is distinguishable from the boarding of an American vessel. The Coast Board may stop and board an American vessel on the high seas without any particularized suspicion of wrongdoing because of the special governmental interest in promoting the safety of American vessels. United States v. Hilton, 619 F.2d 127, 131 (1st Cir. 1980); United States v. Arra, 630 F.2d 836, 841 (1st Cir. 1980). The special interest of this nation in the

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[6] The decision in Williams would effectively dispose of the search and seizure issue in this case, but I hesitate to rely on it completely for two reasons: (1) in that case it was a cargo hold that was searched rather than crew's quarters and (2) there is a well-reasoned concurring opinion at p. 1093 ff. which did not adopt the broad approach of the majority opinion.

safety of American vessels, however, does not extend to foreign flag ships on the high seas. See United States v. Cadena, 585 F.2d 1252, 1263 (5th Cir. 1978).

The Coast Guard had sufficient suspicion to conduct a warrantless investigatory stop of the PERSISTENCE, however. The PERSISTENCE's bow appeared low in the water and her crew had not responded to the attempted Coast Guard radio contacts for two hours. In addition, although one of the defendants stated over the radio that they had come from Bermuda, he later commented in the same conversation that they had recently been in the vicinity of a hurricane which was in the Caribbean. Commander Bates, as an experienced Coast Guard officer viewing these facts, had a reasonable suspicion that the PERSISTENCE was

violating United States laws. See United States v. Cortez, ____ U.S. ___, 49 U.S.L.W. 4099, 4102 (Jan. 21, 1981). The stopping and boarding of the PERSISTENCE did not violate the defendants' Fourth Amendment rights.

2. The Search

It is also necessary to determine whether the search below deck of the PERSISTENCE violated the defendants' Fourth Amendment rights. I conclude from all the circumstances that Kincaid consented to the search and indeed opened the hatch cover himself. See United State v. Balsamo, 468 F.Supp. 1363, 1387 (D. Maine 1979). United States v. Postal, 589 F.2d 862, 890 (5th Cir. 1979). I find no evidence of such a show of force by the boarding party as would have overcome Kincaid's will. His comment about having made

history suggests that he was unflustered and self-possessed.

In addition to the facts creating reasonable suspicion outlined above, Lt. Schenck now knew that one of the crew of the PERSISTENCE had given a false name in radio communication with the RELIANCE. Furthermore, Kincaid's suggestion about the location of the main beam number were palpably false. I find in the alternative to the previous finding, that there was under all the circumstances reasonable suspicion to search the PERSISTENCE below decks. Such reasonable suspicion would justify the search if United States v. Williams, supra, is the law of this Circuit. Since I have no assurance that it is, and even less that it will be, I do not rely on this alternative finding in arriving at my conclusion

that the motion to suppress should be DENIED.

In their reply brief, defendants say that even if the seizure and search were valid, the officers should not have opened the burlap and plastic bales without a warrant. By the time Ensign McCann had gone below deck to search for the main beam number, both he and Lt. Schenck had probable cause to believe that marijuana was on board the PERSISTENCE. The exigent circumstances peculiar to a vessel sailing on the high seas justified the subsequent warrantless search of the burlap bags. United States v. Alfrey, 620 F.2d 551, 555 (5th Cir. 1980). In addition, because the search was followed by an arrest, a search warrant was not necessary. See Cupp v. Murphy, 412 U.S. 291, 295-96 (1973).

The motion to dismiss is accordingly DENIED.

III. MOTION TO DISMISS

A. Destruction of Tape Recordings

Defendants seek to have this case dismissed because the destruction of tape recordings of conversation between the PERSISTENCE and Coast Guard Headquarters denied them their rights to due process of law in violation of the Fifth Amendment.

Oral communications between the United States Coast Guard Cutter RELIANCE and the United States Coast Guard Command Station in New York relating to the sighting, searching, and seizing of the PERSISTENCE on August 10 and 11, 1980 were tape recorded at the Coast Guard Communication Center in Marshfield, Massachusetts. At least three or four voice communications between the ship

and the shore station had occurred during this period.

The tape recordings of oral communication between a Coast Guard vessel and the Command Station are stored for thirty days. They are then placed back into the tape recording machine and new communications are recorded over the old ones. As a result, recordings of the prior conversations are destroyed. The tape recordings of the PERSISTENCE's communications were destroyed in this manner.

On August 27, 1980, defense attorney Miller hand delivered a letter to the Assistant United States Attorney then prosecuting this case requesting discovery and preservation of materials including "all tape recordings ... of any and all communications." After becoming aware of the decision in United States v. Arra, 630 F.2d 836

(1st Cir. 1980), where one of the issues involved the destruction of some United States Coast Guard tape recordings, Miller forwarded another letter on August 28, 1980 to the Assistant U.S. Attorney again requesting the preservation of all tape recordings related to this case. In a footnote, Miller added, "Particular emphasis on the Coast Guard tapes."

On August 29, 1980, Zwerling, attorney for another defendant in this case also forwarded a letter to Commander Bates requesting that the tapes be preserved. A copy of this letter was sent to the United States Attorney's office and to the United States Coast Guard, Fifth District Operations in Portsmouth, Virginia.

The Assistant U.S. Attorney has stipulated that Mr. Miller's letter of August 28th and Mr. Zwerling's letter

of August 29th were received by September 2, 1980. The Coast Guard's Fifth District Operations office also received Mr. Zwerling's letter by September 4, 1980.

On September 4, 1980, an attorney from the Fifth District Operations office called the Coast Guard Assistant Legal Officer in Boston, Lt. William O'Leary. The Fifth District's attorney informed Lt. O'Leary that the defendants' attorneys were requesting that tapes concerning the PERSISTENCE be preserved. Lt. O'Leary then contacted Lt. Ashforth, an intelligence officer in the Coast Guard in charge of the PERSISTENCE investigation and asked that the tapes be preserved. Lt. Ashford did not act to preserve the tapes immediately because he was uncertain whether the tapes were to be merely preserved or also provided to

the defense attorneys. He decided to wait until he received a copy of the defense attorney's letter from the Fifth District.

During this period, on either September 2 or 3, an Assistant U.S. Attorney informed Agent Powers of the Drug Enforcement Agency that the tapes were to be preserved. Agent Powers testified that "several days" later he contacted Lt. Ashforth and requested that the tapes be preserved. The Assistant U.S. Attorney had not informed Powers that the tapes would be destroyed within a week if no request was made. Lt. Ashforth testified that he never received a telephone call from Powers.

On September 8, Lt. O'Leary received a copy of the letter which defense attorney Zwerling had mailed to the Fifth District requesting the pre-

servation of the tapes. Lt. O'Leary did not take immediate action with regard to this letter because he was involved in a Coast Guard legal matter, which as a matter of office policy took precedence over this case. Three days later, on September 11, O'Leary contacted Ashforth and Ashforth informed him that the tapes had already been recorded over.

In order to determine whether a defendant's right to due process has been violated by the destruction of evidence, a three-pronged examination must be conducted. United States v. Arra, 630 F.2d at 849; United States v. Picariello, 568 F.2d 222, 227 (1st Cir. 1978). A court should consider.

> First, was the evidence material to the question of guilt or the degree of punishment; second, was defendant prejudiced by its

> destruction; and third, was the government acting in good faith when it destroyed the evidence.

United States v. Picariello, 568 F.2d at 849.

I conclude that the conduct of Coast Guard and other government personnel did not quite reach the level of bad faith. Their failure to preserve the tapes does not appear to be an intentional effort to deprive the defendants of exculpatory evidence. Compare United States v. Pollock, 417 F.Supp. 1332, 1345-49 (D. Mass. 1976)

Tape recordings of the conversations between the RELIANCE and Coast Guard Headquarters may well have been relevant to the validity of the search and seizure of the PERSISTENCE. The bulk of the radio communications, however, were subsequently confirmed by a print-out form of radio communication

similar to a Telex. The printed communications are available to the defendants. It does not appear that there is any substantive disputed question of fact which would have been illuminated by the lost tapes. I conclude, therefore, that defendants were not prejudiced by the loss of the tape recording. See United States v. Rose, 590 F.2d 232, 237 (7th Cir. 1979); United States v. Miranda, 526 F.2d 1319, 1328 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976). The motion to dismiss on this ground is DENIED.

For the future, however, the Coast Guard and the United States Attorney must employ rigorous and systematic procedures to preserve tape recordings relevant to a case such as this. Repetition of the conduct involved in Arra and in this case might well be

considered the legal equivalent of bad faith. See United States v. Bryant, 439 F.2d 642, 652 (App. D.C. 1971).

B. Misclassification of Marijuana

Defendants also seek to have the indictments against them dismissed, arguing that the classification of marijuana in the Federal Controlled Substances Act (CSA), 21 U.S.C. §801 et seq., is arbitrary and irrational and therefore in violation of the Fifth Amendment. Defendants assert that marijuana is misclassified as a Schedule 1 substance in the CSA because it no longer satisfies any of the three criteria for Schedule 1 listed in 21 U.S.C. §812(b). These criteria are:

> (a) The drug or other substance has a potential for abuse.
>
> (b) The drug or other substance has no currently accepted medical use in treatment in the United States.

> (c) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. §812(b)(1).

Since there is no colorable claim of a fundamental constitutional right to import or to distribute marijuana, United States v. Kiffer, 477 F.2d 349, 352 (2d Cir. 1973), cert. denied, 414 U.S. 831 (1973), or to possess marijuana, National Organization for the Reform of Marijuana Laws (NORML) v. Bell, 488 F.Supp. 123, 130 (D.D.C. 1980), the classification of marijuana as a Schedule 1 substance need only bear a rational relationship to a legitimate state interest. United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). Inquiries, "where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts

either known or which could reasonably be assumed affords support for [the classification]." United States v. Carolene Product Co., 304 U.S. 144, 154 (1938).

Defendants assert that even if Congress correctly classified marijuana in light of scientific knowledge then available, the Schedule 1 classification is no longer rational in view of the present state of knowledge particularly the experimental prescription of marijuana for certain diseases. The statutory criteria for classifying marijuana under §812(b)(1), however, are not the exclusive determinants of whether a drug should subsequently be removed from Schedule 1. NORML v. Bell, 488 F.Supp. at 141. Under §811(c) other factors such as its risk to public health, the pattern of its abuse, and the significance of its

abuse may be considered. In light of these additional factors, the continued classification of marijuana cannot be deemed to be irrational or arbitrary.

Defendants also contend that the marijuana's treatment within the CSA is irrational in relation to other controlled substances. They assert that marijuana is classified with dissimilar and much more dangerous substances. They also argue that the severe penalties for marijuana offenses are irrational since similar conduct involving alcohol and tobacco cannot be criminally punished.

Again, the 'rational basis' test governs these challenges. NORML v. Bell, 488 F.Supp. at 137-39. In classifying marijuana with dissimilar drugs, Congress need not have considered only the potential harm of marijuana; it also may have considered

the magnitude of the social problem involved. Id. at 139. Moreover, the exclusion of alcohol and tobacco from the CSA does not render the CSA unconstitutional. Id. at 138. "A State may 'direct its laws against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.'" Hughes v. Superior Court, 339 U.S. 460, 468 (1950) quoting Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912).

Accordingly, defendants' motion to dismiss is DENIED.

IV. MOTION TO ISSUE A LETTER ROGATORY

Defendants request that a letter rogatory be issued to determine whether the British government did in fact grant authority to the United States

government to board and search the PERSISTENCE. The legality of the actions of the Coast Guard must be judged in the light of the communication to our government by our embassy in London. The defendants are not entitled to divert this court's attention to a collateral inquiry into the procedures of Her Majesty's government. The motion is accordingly DENIED.

_____

United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | * | |
| | * | |
| v. | * | NO.80-274-S |
| | * | |
| ALBERT J. GREEN, ET AL., | * | |

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION FOR APPROPRIATE
RELIEF AND MOTION TO RECONSIDER

April 16, 1981

SKINNER, D.J.

1. MOTION FOR APPROPRIATE RELIEF

So much of this motion as seeks the correction of dates on pages 4 and 6 of my Memorandum and Order of February 18, 1981 is ALLOWED. The motion is otherwise DENIED. Insofar as it requests deletions, the quoted findings are fair inferences from the record. Insofar as it requests additions, these are recitations of evidence which are not required in findings of fact.

2. MOTION TO RECONSIDER

In my order of February 18, 1981, I denied the defendants' motion to suppress evidence on the ground that Kincaid had consented to the below-decks search of the PERSISTENCE. In their motion for reconsideration, defendants claim that they were surprised by my finding because the issue of consent was not asserted, briefed or argued by the Assistance United States Attorney, and they therefore had no opportunity to offer evidence on the point. At the hearing on the Motion to Reconsider, I allowed the motion and took the testimony of Mr. Kincaid.

The inferences supporting consent upon which I relied in my original finding do not withstand the credible contrary testimony of Kincaid. The government has the burden of proof of consent to a warrantless search, and it

has not sustained its burden (and, in fact, has still not argued the point). My finding that Kincaid consented to the search of the PERSISTENCE is accordingly VACATED.

The government argues that the motion to suppress should nevertheless be denied because there was reasonable suspicion to justify the search below decks, citing United States v. Williams, 617 F.2d 1063 (5th Cir. 1980). There are two problems with the Williams case: (1) the search in that case was of the hold of a commercial vessel, as to which a less stringent standard may apply than in the case of crew's quarters, see United States v. Zurosky, 614 F.2d 779, 791 (1st Cir. 1979); and (2) reasonable suspicion has not been adopted as a constitutionally permissible standard for a search on the high seas in this circuit, or

anywhere other than the Fifth Circuit as far as I know.

The government also cites United States v. Williams, 622 F.2d 830 (5th Cir. 1980) and Michigan v. DeFillippo, 443 U.S. 31 (1979), for the proposition that the exclusionary rule should not apply to illegal searches if the officers acted in good faith and in a reasonable belief that the search was legal. This view appears as dictum in the Williams case, and even if it is the law of the Fifth Circuit, it has not received general recognition elsewhere. Michigan v. DeFillippo is not on point.

The net result of the order to suppress in this case is that smugglers of contraband on the high seas may greatly hamper the Coast Guard's ability to intercept their traffic by the simple expedient of using vessels under

foreign registry. Under the law as I perceive it, however, I have no choice but to ALLOW the defendants' motion and order suppression of evidence of the marijuana found aboard the PERSISTENCE.

So Ordered.

_____

United States District Judge

## APPENDIX F

## CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article VI, clause 2, United States Constitution provides:

Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

## STATUTORY PROVISIONS

Title 14 U.S.C. §89. Law enforcement:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the

United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive de-

partment or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

Title 19 U.S.C. §1581. Boarding vessels:

Customs Officers

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

* * *

Application of section to treaties of United States

(h) The provisions of this section shall not be construed to authorize or require any officer of the United States to enforce any law of the United States upon the high seas upon a foreign

vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government.

Title 19 U.S.C. §1587. Examination of hovering vessels:

Boarding and examination

(a) Any hovering vessel, or any vessel which fails (except for unavoidable cause), at any place within the customs waters or within a customs-enforcement area established under the Anti-Smuggling Act, to display lights as required by law, or which has become subject to pursuit as provided in section 1581 of this title, of which, being a foreign vessel to which subsection (h) of section 1581 of this title applies, is permitted by special arrangement with a foreign government to be so examined without the customs waters of the United States, may at any time be boarded and examined by any officer of the customs, and the provisions of said section 1581 shall apply thereto ...

REGULATIONS

Title 19 C.F.R. §162.3(a) states:

(a) General authority. A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:

* * *

(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States; or

(3) Any vessel within a Customs-enforcement area designated such under the provisions of the Anti-Smuggling Act (Act of August 5, 1935, as amended, 49 Stat. 517; 19 U.S.C. 1701, 1703-1711), but Customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign government, or in the absence of a special arrangement with the foreign government concerned.

Title 22 C.F.R. §83.7 provides:

Under the general principles of international and maritime law, crimes and misdemeanors, committed on the high seas and out of the territorial limits of any state, are cognizable only in the courts of the country to which the vessel belongs. For the purpose of prosecuting such crimes the vessel may be regarded as part of the country of registry. These principles are

recognized and enforced by courts of the United States and they are incorporated into Federal statues. Piracy is a notable exception to this rule since the law of nations recognizes this crime as punishable by the authorities of any nation capturing the accused persons and bringing them within the jurisdiction of its courts. Piracy should not be confused with mutiny, which is not an international crime in this sense.

TREATIES

Convention of the High Seas, opened for signature April 28, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200

Article 6 provides in pertinent part:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas ....

Article 22 provides in pertinent part:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That the ship is engaged in the slave trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss of damage that may have been sustained.

THE COURT: This motion to reconsider is allowed.

What do you have to say about the Williams case that involves the search on the high seas; do you think that is the law in this Circuit?

MR. LaCHANCE: Well, I think in Arra, is the law in this Circuit. No, there is no case in this Circuit that adopted Williams that I know of. Unless it came down within the last month. We submit it should be the law of this Circuit and that the Court in Arra has issued a clear invitation with respect to that situation.

THE COURT: Yes. It certainly issued an invitation as to the matter argued before it.

If Williams was standing all by itself, just the majority opinion, that would be on thing, but it's a rather

sharply divided court, not in the result but in the scope. The other problem with it is a distinction that was pointed out in Zurosky, the SALTY DOG case, Mr. Chisholm's case, that it makes a big difference whether you're dealing with the hold of a commercial vessel or the living quarters of a yacht.

MR LaCHANCE: I think it's clear from the record, at least as it's established today, that marijuana was immediately noticeable upon looking down into the navigation compartment.

THE COURT: As opposed to a hold.

MR LaCHANCE: Also as opposed to drawers or bunk areas.

THE COURT: You don't understand how these things are. A navigation area is not, you know, an office like on the Q.E. III, or something or other, it's a slightly compartmentalized area

of the main cabin of this boat unless it's very much different from boats that I have known. Perhaps we ought to get Mr. Kincaid back up here to tell us what separation there was between the navigation area and the living quarters.

MR. ZWERLING: There are also photographs.

MR. LaCHANCE: I think it was the marijauna.

MR. ZWERLING: I would invite the Court to look at the boat.

THE COURT: I would be delighted. I always like to go down and look at boats. But if I can do it with a picture, I will.

MR. ZWERLING: Maybe I can help Mr. LaChance pick up the right one.

THE COURT: I sit here realizing some of these gorgeous vessels are put up for auction, and I'm barred from

going down and bidding on them. It's very frustrating.

I would love to have seen that steel ketch that what's-his-name, Krutschewski, and his friends brought from --

MR. LaCHANCE: The QUESTRIE II.

THE COURT: Yes. We have a picture of that, but that was gold plated.

Let me see the picture.

MR. LaCHANCE: That is a side shot, unfortunately.

MR. KINCAID: The other is midships.

MR. ZWERLING: The bunk has been turned into a nagivationway.

THE COURT: This is the main companionway here?

MR. KINCAID: Yes, sir.

MR. MILLER: That table is also a bunk. You roll up the map and spread out the map.

THE COURT: What is this bulkhead here, Mr. Kincaid? (indicating)

MR. KINCAID: That goes into the owner's state room.

THE COURT: Where is the passageway?

MR. KINCAID: See the ladder on the right front of the photograph, you see the ladder?

THE COURT: Yes.

MR. KINCAID: It goes down into the owner's stateroom and the galley.

THE COURT: I thought this was the companionway that led up to the desk, cockpit?

MR. KINCAID: Yes, it is.

THE COURT: How do you get from here into the --

MR. KINCAID: You walk forward. It's open.

THE COURT: This way? (indicating)

MR. KINCAID: Yes, sir.

THE COURT: This is not a bulkhead here?

MR. KINCAID: A bulkhead with a door in it. You can walk all the way through that. One door on the side. Right there you are standing center ship, and you are loking at the starboard side.

THE COURT: More or less opposite this companionway, this ladder would be a hole in the bulkhead?

MR. KINCAID: Yes, sir, it's an open door.

THE COURT: This is part of the area where people, you know, are passing back and forth?

MR. KINCAID: Yes, sir.
There are two entrance ways into the boat, but that is the main one.

THE COURT: There is a hatch up forward?

MR. KINCAID: Yes, sir.

THE COURT: That is the plexiglass effect?

MR. KINCAID: No, sir. There are two ladderways in the boat.

THE COURT: Is there really?

MR. KINCAID: Yes, sir.

THE COURT: Let me see?

MR. KINCAID: This shows where the ladderway is, and you can show the other photograph of the ladderway.

MR. MILLER: Isn't there a bunk on the other side from where that picture was taken?

MR. KINCAID: It's on the port side, it's a certified navigational living quarter. There is a little sticker up there that says it's certified.

THE COURT: I see, there is a companionway up at the forward end of the deck house, here? (indicating)

MR KINCAID: Yes, sir.

THE COURT: Now, where are we here? Is this the forward companionway?

MR. KINCAID: No, that is the middle one where the photograph was taken from.

THE COURT: I mean, that's the companionway up here (indicating)?

MR. KINCAID: Where the gentleman is coming out of right there? (indicating)

THE COURT: Yes.

MR. KINCAID: Yes.

THE COURT: But it's the one that is at the other end of the cabin from this one?

MR. KINCAID: Yes, sir.

THE COURT: So you have a galley, it appears to be a galley on the port side here and looks like a --

MR. KINCAID: That is looking aft. The galley, actually --

THE COURT: This is looking aft?

MR. KINCAID: Yes, sir.

THE COURT: I have it all backwards, again, then.

MR. LaCHANCE: It's a long boat.

MR. KINCAID: The gentleman is coming up the companionway facing aft.

THE COURT: I see.

MR. KINCAID: So the ladderway faces aft.

THE COURT: All right. So this is on the starboard side, then?

MR. KINCAID: Yes, sir.

THE COURT: And then there are bunks forward?

MR. KINCAID: That is a main salon where the individual is standing, where they took the photograph.

THE COURT: What is behind this?

MR. KINCAID: That is a state room.

THE COURT: A state room?

MR. KINCAID: Yes, sir.

THE COURT: And is that the same state room that you get into from going forward from this picture?

MR. KINCAID: Yes, sir. Oh, I think you would have to treat that, Mr. LaChance, as all the same. It's a navigation area to be sure, but it's a passageway.

MR. LaCHANCE: The point I was trying to make, they looked down from the top and didn't physically enter underneath the deck.

THE COURT: But it wasn't in plain sight, though, because the hatch was closed.

MR. LaCHANCE: No, no, I agree with you on that. But they did not have to enter and search through the living compartments before they became aware of the contents of the bales.

THE COURT: But they did look into a living area. They didn't have to

turn out the drawers, perhaps.

MR. LaCHANCE: Clearly, the point, the hatch came open and they saw the burlap bags and bales. They had probable cause to complete whatever search they may have started.

THE COURT: Sure. The question is, were they entitled to open the hatch? Now, if it had been a deck hatch leading to a fish hold, I think it's a little bit different. That was the situation in Wiliams, wasn't it?

MR. LaCHANCE: I'm not sure what the hold was for, you Honor.

THE COURT: Well, it was a cargo hold or something.

MR. LaCHANCE: Would your Honor like to keep those photographs or mark them for the record?

THE COURT: Probably they ought to be marked. Why don't we mark them. Do you want them as government exhibits or

defense exhibits?

MR. ZWERLING: Maybe we should have them marked as reconsideration Exhibits 1 and 2.

THE COURT: 1, 2 and 3.

MR. ZWELRING: 1, 2 and 3. The record will be clear as to where they can be found.

THE COURT: Yes.

Defendant stickers are all right.

MR. LaCHANCE: Or joint reconsideration exhibits.

MR. MILLER: Was that a pun?

MR. LaCHANCE: It wasn't intended as such.

THE COURT: All right, I'll get those citations from you, Mr. LaChance, this afternoon?

MR. LaCHANCE: Either this afternoon or tomorrow morning.

THE COURT: If you pull them up this afternoon, then I will start

working on it tomorrow morning. Thank you.

(Defendant's Exhibit 1, 2, and 2 in evidence, three photographs.)

(Whereupon the hearing was concluded.)

# Opposition

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FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2086

# In the Supreme Court of the United States

OCTOBER TERM, 1981

ALBERT GREEN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

REX E. LEE
*Solicitor General*
*Department of Justice*
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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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ALBERT GREEN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioners contend that the court of appeals erred in reversing an order suppressing evidence obtained from a search of a vessel on the high seas.

In a two-count indictment returned in the United States District Court for the District of Massachusetts, petitioners were charged with conspiracy to import marijuana (21 U.S.C. 952(a) and 963) and conspiracy to possess marijuana with intent to distribute it (21 U.S.C. 841(a)(1) and 846). The charges stemmed from the seizure, by Coast Guard officers, of five tons of marijuana from petitioners' ship, a British flag vessel, after the officers received permission from the British government to board (Pet. App. A.2-A.8).

On petitioners' motion, the district court suppressed the evidence on the ground that the search of petitioners' vessel was not based on probable cause (Pet. App. A.77-A.81).

The court of appeals reversed, concluding that the Fourth Amendment permits government officers, who are otherwise authorized, to board and search a vessel on the high seas where there is reasonable suspicion that the vessel is being used for criminal activity (Pet. App. A.1-A.30).

Petitioners contend that the boarding of their vessel was in violation of the Law of the Sea: Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, and thus violated United States law, that the Coast Guard officers lacked statutory authority to board, and that the search of the living quarters on the vessel violated the Fourth Amendment because it was not based on probable cause. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision, which rejected each of these arguments, places petitioners in precisely the same position they would have occupied had the district court determined that the boarding and search of the vessel were proper. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

MAY 1982

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*Because this case is interloctory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1982-05

# Petitioner's Reply Brief

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NO. 81-2086

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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ALBERT GREEN,
ALFRED KINCAID, and
KELLY TWOMEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

# PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

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| 28 U.S.C. §1254(1) | 7,9 |
| **TREATIES** | |
| Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200 | passim |

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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NO. 81-2086

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ALBERT GREEN, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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# PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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On May 11, 1982 the petitioners timely filed a Petition for a Writ of Certiorari with this Court claiming, inter alia, that in a far reaching and unprecedented decision the United States Court of Appeals for the First Circuit

erroneously reversed the United States District Court for Massachusetts' grant of the petitioners' Motion to Suppress evidence seized from the private living quarters of a foreign flag sailing vessel upon the high seas. Specifically, the petitioners contend: (1) that the boarding of the foreign flag vessel upon the high seas to search for evidence of criminal activity was in violation of the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, and, therefore, in violation of the law of the United States; (2) that the boarding of the foreign flag sailing vessel on the high seas was not authorized by 19 U.S.C. §§1581(h), 1587(a) or any other statutory provision; and (3) that the search of the private living quarters of the foreign sailing yacht on the high seas for evidence of criminal activity without

probable cause violated the fourth amendment to the United States Constitution, and that the the First Circuit erred by holding to the contrary.

On May 27, 1982, the United States filed a Memorandum in Opposition asking this Court to deny the Petition stating that the case was not ripe for review. The government did not address the merits.

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

1. Presently, there is great confusion among the lower federal courts regarding the applicability of the Fourth Amendment to both boardings and searches of sailing vessels in a non-border context. This Court has never addressed these issues.

Last week, however, this Court granted certioriari in United States v. Villamonte-Marquez, No. 81-1350 (June 7, 1982) to determine the degree of cause required to justify a non-border related boarding of a sailing vessel. [1] The

[1] In United States v. Villamonte-Marquez, 652 F.2d 481, 483 (5th Cir. 1981) cert. granted, No. 81-1305 (June 7, 1982), an American sailing vessel was boarded by the United States Customs in a non-border context, 18 miles inland from the Coast. Because the government agents were without any reasonable suspicion suggesting a possible law violation at the time of the boarding of the vessel, the court below held that the government's actions violated the Fourth Amendment.

In the case sub judice, the petitioners do not contest the fact that at the time of the boarding of their vessel, PERSISTENCE, the Coast Guard, allegedly acting under their Customs authority, had reasonable suspicion. Rather, the petitioners contend that the boarding of the PERSISTENCE was unlawful because the Coast Guard as customs officers were without statutory authority to board foreign vessels well beyond our borders, and because the boarding violated the Convention on the High Seas, a treaty with Great Britian, the flag nation of the PERSISTENCE, and was, therefore, in

(Footnote continued on following page.)

case sub judice raises the integrally related issue of what degree of cause is required to constitutionally permit a non-border related search of the living quarters on board a sailing vessel, assuming a lawful boarding has taken place. [2] The holding of the First

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(Footnote continued from previous page.) violation of United States law. See Constitution, Article VI, cl. 2. Like the Fourth Amendment issue, the interpretation and applicability of the Convention on the High Seas has been a source of great confusion for the lower courts. Compare: United States v. Cadena, 585 F.2d 1252, 1260 n. 16 (5th Cir. 1978); United States v. Postal, 589 F.2d 862 (5th Cir.) cert. denied, 444 U.S. 832 (1979); United States v. Green, 671 F.2d 46 (1st Cir. 1982). See also authorities cited in petitioners' Petition for Writ of Certiorari at p. 12.

[2] In United States v. Villamonte-Marquez, supra at 486, the court was "only concerned with the constitutionality of the officers' initial boarding of the vessel [since the defendants did] not contest the existence of probable cause and exigent circumstances to justify a warrantless search of the vessel once the officers had boarded it and smelled marijuana."
(Footnote continued on following page.)

Circuit below requiring only reasonable suspicion to justify such a search goes well beyond the holding of any other Court of Appeals, see e.g., United States v. Williams, 617 F.2d 1063, 1087 (5th Cir. 1980) en banc; United States v. Hicks, 624 F.2d 32, 33-34 n. 2 (5th Cir. 1980); United States v. Caicedo-Asprilla, 632 F.2d 1161, 1168 (5th Cir. 1980) cert. denied, 450 U.S. 1000 (1981); United States v. Villamonte-Marquez, supra at 483, and beyond the well established constitutional principle recently reaffirmed by this Court in United States v. Ross ___ U.S. ___, No. 80-2209, Slip Op.

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(Footnote continued from previous page.)
In the case sub judice, both lower federal courts held that only reasonable suspicion existed, and not probable cause, prior to the search of the living quarters of the PERSISTENCE. See Petition for Certiorari, Appendix at p. A. 29, 61, 79.

at 10, 26-27 (June 1, 1982) that probable cause is required prior to searches of vehicles for transportation. If probable cause to believe an automobile contains contraband is necessary to justify its search, then it is surely required for the search of living quarters of a sailing yacht, the crew's home while at sea.

2. Congress granted this Court jurisdiction to grant a Writ of Certiorari upon the petition of a party to a criminal case after rendition of a judgment by the Court of Appeals. See 28 U.S.C. 1254(1). The Court of Appeals for the First Circuit rendered its judgment in this case on February 19, 1982, and denied a rehearing on March 12, 1982. Furthermore, the petition is in conformity with the Rules of the United States Supreme Court, Rule 17, insofar as the

judgment of the First Circuit conflicts with the law of other Courts of Appeal, as well as with decisions of this Court, and decided important questions of federal law which have not been, but should be, settled by this Court. See discussion supra at 4-7. Therefore, this case is ripe for review.

The government's bald assertion, without citation, that this petition is not ripe for review should be rejected. The government exercised its discretion to take an appeal, pursuant to 18 U.S.C. §3731, from the district court's order of suppression. When Congress enacted 18 U.S.C. §3731 it placed no limitations upon any further action in the appellate courts by either party subsequent to the rendition of a judgment by a Court of Appeals. Either party, after judgment, can file for a

rehearing or rehearing en banc, and neither party is prevented under the statute or the Rules of this Court from filing for a petition for a Writ of Certiorari. Quite clearly, had the government lost their case in the First Circuit, they would have had the right to petition this Court for a Writ of Certiorari based solely upon 28 U.S.C. §1254(1). The procedural manner with which a case is brought before the Court of Appeals should be irrelevant for the purposes of certiorari so long as a proper judgment has been rendered by the Court of Appeals.

There is no statutory or public policy bar to the Court hearing this case. To the contrary, strong public policy dictates against having erroneous decisions on important constitutional and international principles standing

as the law within any circuit of our country, so long as the case or controversy is properly brought before this Court. [3] The judgment in this case presently stands as the law of the First Circuit, and for the reasons previously stated, the decision below was erroneous and should be reversed by this Court.

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[3] The petitioners have already expended a great deal of time and money in the appellate process and it would be an additional burden to require the petitioners to go through the entire process again when their cause is already properly before this Court. The petitioners are certainly not in the same position they would have been had the district court initially denied their motion to suppress. Undue delay and expense would be the only result from this Court's not hearing this case now. Furthermore, were the petitioners to be acquitted or plead guilty in the district court, the erroneous decision in the Court of Appeals would remain the unchallenged law of the First Circuit, only fostering further confusion and delay in this Court settling the important constitutional and international issues involved herein.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfilly submitted,

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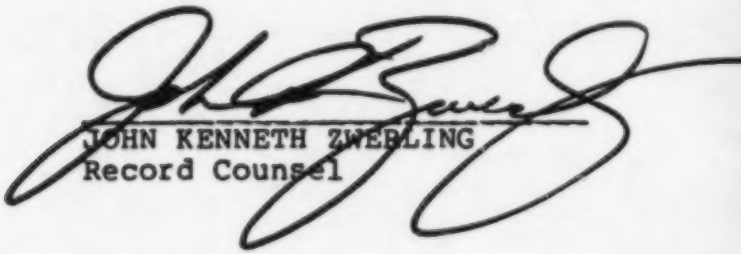
## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 1982 three true and accurate copies of this Petitioners' Reply To The Memorandum For The United States In Opposition was mailed, first class, postage prepaid, to the Office of the Solicitor General, Department of Justice, Washington, D.C.



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